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6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

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9 MICHAEL L. SMITH, Case No. 3:13-cv-00246-RCJ-WGC

10 v. Petitioner, ORDER

11 RENEE BAKER, et al.,

12 Respondents.

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14 Before the court is respondents' motion to dismiss certain grounds in Michael L.
15 Smith's 28 U.S.C. § 2254 habeas corpus petition because they are unexhausted,
16 procedurally barred, or fail to state a cognizable claim (ECF No. 52). Smith opposed
17 the motion, and respondents replied (ECF Nos. 74, 80). As discussed below, the motion
18 is granted in part.

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20 **I. Background & Procedural History**

21 A grand jury indicted Smith, along with Adrian McKnight and Ronnie Antonio
22 Gibson, on two counts conspiracy to commit robbery, one count robbery, one count
23 battery with intent to commit a crime, two counts robbery with victim 60 years of age or
24 older, one count murder, one count attempted murder, and one count possession of
25 stolen vehicle (exhibits 5, 6).¹ The charges stemmed from two separate robberies
26 committed on or about May 29, 2007, that resulted in the death of one of the elderly
27 victims. *Id.* In June 2009, a jury convicted Smith of all charges, with the exception of

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1 Exhibits 1-208 are found at ECF Nos. 10-19. Exhibits 224-306 are found at ECF Nos. 53-68.

1 finding Smith guilty of battery instead of attempted murder. Exh. 105. The state district
2 court sentenced Smith to two consecutive life sentences without the possibility of
3 parole. Exh. 120. Judgment of conviction was filed on August 6, 2009. Exh. 120.

4 The Nevada Supreme Court affirmed Smith's convictions. Exh. 149. After
5 conducting an evidentiary hearing on his state postconviction habeas corpus petition,
6 the state district court denied the petition. Exh. 172. The Nevada Supreme Court
7 affirmed the denial of the petition on December 12, 2012. Exh. 193.

8 Smith dispatched his federal habeas corpus petition for filing in April 2013 (ECF
9 No. 5). This court granted his motion for appointment of counsel (ECF No. 4). Smith
10 filed a counseled first-amended petition and a motion for stay and abeyance, which this
11 court granted (ECF Nos. 9, 34, 39). The case was stayed while Smith litigated his
12 second state postconviction petition. Exhs. 282, 287, 290, 298. On April 11, 2018, the
13 Nevada Court of Appeals affirmed the denial of his second state postconviction petition.
14 Exh. 303. In July 2018, Smith filed a motion to reopen the case and a second-amended
15 petition (ECF Nos. 41, 44). Respondents now move to dismiss certain claims in the
16 second-amended petition as unexhausted, procedurally barred, or noncognizable in
17 federal habeas corpus (ECF No. 52).

18 **II. Legal Standards & Analysis**

19 **a. Exhaustion**

20 Respondents argue that ground 1 and grounds 10 and 11 in part are
21 unexhausted. A federal court will not grant a state prisoner's petition for habeas relief
22 until the prisoner has exhausted his available state remedies for all claims raised. *Rose*
23 v. *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state
24 courts a fair opportunity to act on each of his claims before he presents those claims in
25 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also
26 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the
27 petitioner has given the highest available state court the opportunity to consider the
28 claim through direct appeal or state collateral review proceedings. See *Casey v. Moore*,

1 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir.
2 1981).

3 Smith contends in ground 1 of his second-amended petition that the trial court
4 erred in refusing to sever his trial from that of his co-defendant (ECF No. 44, pp. 14-21).
5 This court has already ruled that ground 1 is exhausted (see ECF No. 33, pp. 4-5).

6 Respondents also argue that certain subparts of grounds 10 and 11 are
7 unexhausted (ECF No. 52, pp. 12-13). Those subparts were presented in earlier
8 operative petitions, but Smith does not present them in his second-amended petition
9 (see ECF No. 44, pp. 27-42).

10 **b. Procedural Default**

11 Next, respondents argue that grounds 6, 9 and parts of grounds 10 and 11 are
12 procedurally defaulted (ECF No. 52, pp. 13-15). 28 U.S.C. § 2254(d) provides that this
13 court may grant habeas relief if the relevant state court decision was either: (1) contrary
14 to clearly established federal law, as determined by the Supreme Court; or (2) involved
15 an unreasonable application of clearly established federal law as determined by the
16 Supreme Court.

17 “Procedural default” refers to the situation where a petitioner in fact presented a
18 claim to the state courts but the state courts disposed of the claim on procedural
19 grounds, instead of on the merits. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).
20 A federal court will not review a claim for habeas corpus relief if the decision of the state
21 court regarding that claim rested on a state law ground that is independent of the
22 federal question and adequate to support the judgment. *Id.*

23 The *Coleman* Court explained the effect of a procedural default:

24 In all cases in which a state prisoner has defaulted his federal claims in
25 state court pursuant to an independent and adequate state procedural
26 rule, federal habeas review of the claims is barred unless the prisoner can
27 demonstrate cause for the default and actual prejudice as a result of the
28 alleged violation of federal law, or demonstrate that failure to consider the
claims will result in a fundamental miscarriage of justice.

1 Coleman, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The
2 procedural default doctrine ensures that the state's interest in correcting its own
3 mistakes is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d
4 1039, 1046 (9th Cir. 2003).

5 To demonstrate cause for a procedural default, the petitioner must be able to
6 "show that some objective factor external to the defense impeded" his efforts to comply
7 with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to
8 exist, the external impediment must have prevented the petitioner from raising the
9 claim. See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

10 To demonstrate a fundamental miscarriage of justice, a petitioner must show the
11 constitutional error complained of probably resulted in the conviction of an actually
12 innocent person. *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). "[A]ctual
13 innocence" means factual innocence, not mere legal insufficiency." *Bousley v. United
14 States*, 523 U.S. 614, 623 (1998). This is a narrow exception, and it is reserved for
15 extraordinary cases only. *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Bare allegations
16 unsupported by evidence do not tend to establish actual innocence sufficient to
17 overcome a procedural default. *Thomas v. Goldsmith*, 979 F.2d 746, 750 (9th Cir.
18 1992).

19 Here, Smith presented the claims discussed below – federal grounds 6, 9 and
20 parts of 10 – to the Nevada Court of Appeals in his appeal of the denial of his second
21 state postconviction petition. Exhs. 221, 229. The Nevada Court of Appeals affirmed
22 the denial of the petition as procedurally barred because it was untimely and
23 successive. Exh. 303; NRS 34.810(1)(b)(2); NRS 34.810(2). Petitioner bears the
24 burden of proving good cause for his failure to present the claim and actual prejudice.
25 NRS 34.810(3). The Ninth Circuit Court of Appeals has held that, at least in non-capital
26 cases, application of the procedural bar at issue in this case – NRS 34.810 – is an
27 independent and adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th
28 Cir. 2003); see also *Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999).

1 Therefore, the Nevada Court of Appeal's determination that these federal grounds were
2 procedurally barred under NRS 34.810(1)(b) was an independent and adequate ground
3 to affirm the denial of the claims in the state petition.

4 **Ground 6**

5 Smith contends that the State concealed material exculpatory information about
6 codefendant Gibson's plea deal and misrepresented the terms of the plea agreement to
7 the jury in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and Smith's Fifth, Sixth,
8 and Fourteenth Amendment rights to due process and a fair trial (ECF No. 44, pp. 21-
9 23).

10 Smith urges that he can demonstrate good cause and actual prejudice to excuse
11 the procedural default of ground 6 (ECF No. 74, pp. 6-17). He argues that the State's
12 failure to disclose material, exculpatory evidence about the plea deal with co-defendant
13 Gibson itself provides good cause. The state has an affirmative duty to disclose material
14 exculpatory evidence to the defense, with or without a specific request by the defense.
15 *Strickler v. Greene*, 527 U.S. 263, 280 (1999), citing *United States v. Agurs*, 427 U.S.
16 97, 107 (1976). Even more fundamentally, the state has a duty to not allow false
17 evidence "to go uncorrected," *Napue v. Illinois*, 360 U.S. 264, 269-270 (1959), and to
18 not present false evidence. *Giglio v. U.S.*, 405 U.S. 150, 153 (1972). Smith argues that
19 the State failed to disclose and misrepresented the plea deal with Gibson.

20 The plea agreement, as it was presented at the June 2009 trial, reduced
21 Gibson's first-degree murder charge to voluntary manslaughter. Exhs. 64-66. The plea
22 agreement stated that Gibson's sentences could be run concurrently or consecutively.
23 When Gibson entered his plea, however, his counsel informed the court that the State
24 had agreed not to oppose concurrent time for the three offenses. Exh. 64, pp. 4-6.
25 Defense counsel elicited testimony from Gibson that he was eligible for probation, but
26 Gibson did not say that the State had promised to recommend probation. Exh. 92, pp.
27 106-109. On redirect, the prosecutor elicited testimony from Gibson that Gibson was
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1 actually endangering himself by serving as a “snitch” and that Gibson could still
2 potentially serve 31 years in prison. *Id.* at 226-228.

3 Smith was ultimately sentenced to two consecutive terms of life without the
4 possibility of parole, and judgment of conviction was filed in August 2009. Exh. 120.
5 Smith filed his appellate brief with the Nevada Supreme Court on March 31, 2010. Exh.
6 144. Subsequently, on May 13, 2010, Gibson was sentenced to what amounted to a
7 term of 57 to 252 months. Exh. 146. The state district court suspended his sentence
8 and imposed probation not to exceed 5 years. *Id.* The State apparently maintains that
9 this much more lenient sentence was due to the strength of letters of support that the
10 court received on Gibson’s behalf. See exh. 285, pp. 10-12. Smith’s theory is that
11 Gibson’s testimony was conditioned on some additional agreement that was not
12 disclosed to the defense or the jury. He alleges that the additional, undisclosed
13 agreement must have included the State’s recommendation that Gibson receive
14 probation instead of prison time.

15 In affirming the denial of Smith’s second state postconviction petition as time-
16 barred and successive, the Nevada Court of Appeals held that Smith failed to establish
17 that the State withheld evidence of a further plea agreement with Gibson, let alone the
18 existence of such evidence. Exh. 303, p. 3, citing *State v. Huebler*, 275 P.3d 91, 94-95
19 (Nev. 2012)(discussing the relationship between good cause for an untimely habeas
20 petition and the test for a claim raised under *Brady v. Maryland*). The court also pointed
21 out that the basis for Smith’s argument had been available since Gibson was sentenced
22 in May 2010, and he did not explain why he could not have raised this argument in his
23 first state postconviction petition, which he filed in July 2011. *Id.*

24 Smith has not shown that an impediment external to the defense prevented him
25 from timely filing this claim. Ground 6 is therefore dismissed as procedurally barred.

26 **Ground 9**

27 Smith argues that the prosecutor improperly introduced prejudicial and irrelevant
28 information about the victim in violation of Smith’s Fifth, Sixth, and Fourteenth

1 Amendment rights to a fair trial and due process (ECF No. 44, pp. 26-27; ECF No. 52,
2 pp. 13-15).

3 Smith urges that he can demonstrate good cause and actual prejudice to excuse
4 the procedural default of ground 9 (ECF No. 74, pp. 6-17). He argues three bases: 1)
5 the state improperly interfered with the appointment of counsel; 2) the court erred when
6 it denied Smith the appointment of counsel; and 3) the State failed to comply with its
7 duties to provide exculpatory information. *Id.* at 6. None of these provide cause here.
8 This claim was known to Smith when the allegedly improper evidence was elicited at
9 trial, and Smith was required to raise it on direct appeal. The denial of counsel to litigate
10 his first state postconviction petition had no bearing on his ability to raise this claim on
11 direct appeal. Finally, the allegedly exculpatory information regarding Gibson's plea
12 deal also had no bearing on this claim that the prosecutor improperly introduced
13 prejudicial and irrelevant information at trial. Smith has failed to demonstrate an
14 impediment external to the defense prevented him from timely filing this claim. He has
15 not demonstrated cause for his failure to timely raise federal ground 9. Therefore, it is
16 dismissed as procedurally defaulted.

17 **Ground 10**

18 Respondents contend that certain trial counsel IAC claims are procedurally
19 defaulted (ECF No. 52, pp. 13-15). They challenge the following claims of trial counsel
20 IAC in ground 10 of Smith's second-amended petition:²

21 Ground 10(1): counsel failed to object to leading questions asked of Detective
22 Jensen as part of the State's attempt to avoid confrontation clause issues during the
23 joint trial (ECF No. 44, p. 28);

24 Ground 10(2): counsel failed to seek a specific instruction that the jury disregard
25 the statement of McKnight for purposes of determining Smith's guilt (*id.*);

26 Ground 10(3): counsel failed to remedy the State's misleading testimony and
27 statements in closing argument by introducing the transcript of the statement that Smith

28 ² The court follows petitioner's numbering of his claims in the second-amended petition.

1 gave to the police. To the extent the trial court barred him from doing so, counsel was
2 ineffective for failing to challenge any such ruling (*id.*).³

3 Smith insists that he can show cause and prejudice to excuse the procedural default
4 of these trial IAC claims pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), which held
5 that the failure of a court to appoint counsel, or the ineffective assistance of counsel in a
6 state postconviction proceeding, may establish cause to overcome a procedural default
7 in specific, narrowly-defined circumstances. The Court in *Coleman* held that ineffective
8 assistance of counsel in postconviction proceedings does not establish cause for the
9 procedural default of a claim. *Coleman*, 501 U.S. at 750. In *Martinez*, the Court
10 established a “narrow exception” to that rule. The Court explained that,

11 Where, under state law, claims of ineffective assistance of trial counsel
12 must be raised in an initial-review collateral proceeding, a procedural
13 default will not bar a federal habeas court from hearing a substantial claim
14 of ineffective assistance at trial if, in the initial-review collateral proceeding,
15 there was no counsel or counsel in that proceeding was ineffective.

16 566 U.S. at 17.

17 In *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir. 2014), the Ninth Circuit provided
18 guidelines for applying *Martinez*, summarizing the analysis as follows:

19 To demonstrate cause and prejudice sufficient to excuse the
20 procedural default, therefore, *Martinez* . . . require[s] that Clabourne make
21 two showings. First, to establish “cause,” he must establish that his
22 counsel in the state postconviction proceeding was ineffective under the
23 standards of *Strickland [v. Washington*, 466 U.S. 668 (1984)]. *Strickland*,
24 in turn, requires him to establish that both (a) post-conviction counsel's
performance was deficient, and (b) there was a reasonable probability
that, absent the deficient performance, the result of the post-conviction
proceedings would have been different. Second, to establish “prejudice,”
he must establish that his “underlying ineffective-assistance-of-trial-
counsel claim is a substantial one, which is to say that the prisoner must
demonstrate that the claim has some merit.”

25 *Clabourne*, 745 F.3d at 377 (citations omitted).

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28 ³ Respondents also argue that a fourth trial counsel IAC claim is procedurally barred, but that claim is not
presented in the second-amended petition (see ECF No. 52, p. 13; ECF No. 44, pp. 27-31).

1 Here, Smith lacked counsel in his first state postconviction petition, thus he can
2 establish cause under *Martinez*. The prejudice analysis with respect to these claims is
3 intertwined, to a large extent, with the analysis of the underlying merit of the claim.
4 Moreover, the substantive claims of trial error underlying these IAC claims are also
5 before the court for resolution on the merits. As such, the court will defer ruling on the
6 *Martinez* issue until the merits of the claims are briefed in respondents' answer and
7 Smith's reply brief.

8 **Ground 11**

9 Respondents also argue that some of Smith's appellate IAC claims are
10 procedurally defaulted (ECF No. 52, pp. 14-15). However, none of the claims that they
11 enumerate in the motion to dismiss are presented in the second-amended petition (see
12 ECF No. 52 , p. 14; ECF No. 44, pp. 31-42).

13 **c. Waiver**

14 Respondents argue that Smith waived several subparts of grounds 10 and 11
15 because in some cases Smith may have referred back by ground number to previously-
16 presented underlying substantive claims that were not presented in the second-
17 amended petition (ECF No. 52, pp. 15-17). The court deems this an overly-technical,
18 disingenuous argument, particularly when, in arguing waiver, respondents have again
19 challenged some subparts that are not presented in the second-amended petition. The
20 court also agrees with Smith that it is clear that in some instances he is incorporating
21 the previously dismissed claims when setting forth the ineffective assistance of counsel
22 claims in grounds 10 and 11. The court declines to hold that Smith has waived any
23 subparts of grounds 10 and 11.

24 **d. Cognizability**

25 Respondents argue that grounds 12 and 13 fail to state a claim for which federal
26 habeas relief may be granted (ECF No. 52, p. 17). A state prisoner is entitled to federal
27 habeas relief only if he or she is being held in custody in violation of the constitution,
28 laws or treaties of the United States. 28 U.S.C. § 2254(a). Unless an issue of federal

1 constitutional or statutory law is implicated by the facts presented, the claim is not
2 cognizable under federal habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

3 **Ground 12**

4 Smith alleges that the cumulative effect of the errors he asserts violated his
5 federal constitutional right to a fair trial (ECF No. 44, p. 43). Respondents argue that he
6 fails to state a claim for which relief may be granted because he does identify with
7 specificity the clearly established federal right violated (ECF No. 52, p. 17). This court
8 concludes that ground 12, on its face, asserts a violation of Smith's Fourteenth
9 Amendment right to a fair trial. Further, the Ninth Circuit Court of Appeals conducts
10 cumulative error review in habeas cases. “[T]he fundamental question in determining
11 whether the combined effect of trial errors violated a defendant's due process rights is
12 whether the errors rendered the criminal defense 'far less persuasive' than it otherwise
13 might have been, and thereby had a 'substantial and injurious effect or influence' on the
14 jury's verdict.” *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) (internal citations
15 omitted.). See also *Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003) (holding
16 cumulative impact of all of the errors in the case was more than sufficient to
17 demonstrate prejudice and that as a result, the defendant was deprived of a
18 fundamentally fair trial). Ground 12 states a cognizable claim insofar as it refers to
19 claims still before this court.

20 **Ground 13**

21 Finally, Smith contends that the state district court violated his constitutional right
22 to a neutral and detached magistrate when it adopted verbatim the State's proposed
23 order denying his second state postconviction petition (ECF No. 44, pp. 43-45).
24 Respondents point out that errors in post-conviction proceedings are not cognizable in
25 federal habeas actions because they do not allege that the petitioner is in custody in
26 violation of his federal constitutional rights. *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th
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Cir. 1989).⁴ Accordingly, ground 13 is dismissed as noncognizable on federal habeas review.

III. Conclusion

IT IS THEREFORE ORDERED that respondents' second motion to dismiss (ECF No. 52) is **GRANTED** in part as follows:

Grounds 6 and 9 are **DISMISSED** as procedurally barred.

A decision on ground 10 is deferred.

Ground 13 is **DISMISSED** for failure to state a claim.

IT IS FURTHER ORDERED that respondents shall have **60 days** from the date this order is entered within which to file an answer to the remaining claims in the first-amended petition.

IT IS FURTHER ORDERED that petitioner shall have **45 days** following service of respondents' answer in which to file a reply.

Dated: March 6, 2020.


ROBERT C. JONES
UNITED STATES DISTRICT JUDGE

⁴ Smith appears to acknowledge that ground 13 fails to state a claim as he does not address ground 13 in his opposition to the motion to dismiss (see ECF No. 74).